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Supreme Court, U.S.
FILED
SEP 28 2004
OFFICE OF THE CLERK

No. 03-1545

In the

Supreme Court of the United States

STEPHEN WOLK and HELEN J. WOLK,

Petitioners,

v.

ORANGE COUNTY, FLORIDA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE PETITIONERS IN REPLY

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I. THE PRESENCE IN THE STATUTORY/ORDINANCE SCHEME OF THE HEARING PROVIDED UNDER FS §162.07/OCC §11-35[1] FOR THE INITIAL DETERMINATION AS TO WHETHER A VIOLATION OF THE CODES EXISTS DOES NOT SATISFY THE REQUIREMENTS OF DUE PROCESS BECAUSE, WHERE AN ORDER IS ISSUED CONDITIONALLY IMPOSING A FINE ON A PARTY UPON THAT PARTY'S FAILURE TO DO SOME ACT, DUE PROCESS REQUIRES A SECOND HEARING AS TO WHETHER OR NOT THAT PARTY IN FACT FAILED TO DO THAT ACT BEFORE THE FINE MAY BE IMPOSED.

Respondents base their argument that the instant decisions are not in conflict with precedent largely on the fact that a hearing is provided under the statutory/ordinance scheme pursuant to FS §162.07/OCC §11-35 relative to the initial determination of whether a violation of the codes exists on the owner's property (hereinafter, "the initial hearing"). They contend that this initial hearing satisfies all the requirements of due process with respect to a later imposition of fines and liens on the property owner pursuant to an order of the code enforcement board (hereinafter, "CEB") issued at that hearing, and makes the later imposition of fines and liens on the property owner without notice and hearing constitutionally permissible (CEB pp. 2, 3, 9, 14, 15; OC p. 11, 14[2]). This argument is contrary to procedural due process jurisprudence.

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[1] Petitioners will employ in this reply the same abbreviations as were used in the petition. References to Florida Statutes will be preceded by the abbreviation "FS" followed by the "§" sign and the number of the statute referred to as above. References to ordinances of the Orange County Code will be preceded by the abbreviation "OCC" followed by the "§" sign and the number of the ordinance referred to as above.

[2] Hereinafter, references to Orange County's brief in opposition to the

The scheme for code enforcement in question establishes a system wherein orders are issued at the initial hearing conditionally imposing a fine on the respondent property owner for failure to do some act in the future, i.e., to cause his property to be brought into compliance with the code(s) by a specified date. Where an order is issued conditionally imposing a fine on a party for that party's failure to do some act by a date in the future, due process requires that there be a second hearing afforded as to whether or not that party failed to do the specified act by the specified date before the fine may constitutionally be imposed on him. *See, e.g., Mercer v. Mitchell*, 908 F.2d 763 (11th Cir. 1990); *First Maryland Leasecorp. v. M/V Golden Egret*, 764 F.2d 749 (11th Cir. 1985).

In *Mercer*, a district court entered an order providing that, in the event that a jail population exceeded a stated cap, a fine of $100.00 for each prisoner in excess of the cap for each day that the cap was exceeded would be imposed on the defendant county. Later, based solely on a certification of the plaintiffs as to the population of the jail, the court imposed a fine on the county "in accordance with" its earlier order without holding a hearing. 908 F.2d at 766. On appeal by the county, the appellate court held that the imposition of the fine on the county without having afforded the county a hearing as to whether it had violated the court's earlier order violated the county's right to procedural due process. *Id.*

Similarly, in *Golden Egret*, a district court ordered the defendant to remove ship hulls from a shipyard by a certain date and provided for a daily fine in the event that the defendant failed to do so. Later, without holding a hearing, the court entered a second order imposing a fine on the

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petition will be made by the designation "OC" followed by the page number(s) of the page(s) of the brief where the referenced material appears as above. References to the Orange County Code Enforcement Board's brief in opposition will similarly be made by the designation "CEB" followed by the page number(s) of the page(s) of the brief on which the referenced material appears.

defendant for having failed to comply. The appellate court held that entry of the second order imposing the fine without allowing the defendant a hearing as to whether or not he had failed to comply with the court's earlier order violated the defendant's procedural due process rights. 764 F.2d at 759.

Thus, when the CEB, like the district courts in the above-cited cases, issues an order at the initial hearing conditionally imposing a fine on a respondent property owner for failure to have corrected alleged violations on his property by a date in the future, due process requires that the CEB, like those district courts, hold a second hearing to determine if the property owner in fact did not comply with its order before imposing the fine or lien. Therefore, the code enforcement scheme purporting to provide as it does for the imposition of fines and liens on a property owner for his alleged failure to have complied with the order of the CEB issued at the initial hearing without a second hearing to determine his asserted non-compliance renders that scheme unconstitutional on its face, and makes the imposition of a fine and lien on the property owner without notice and hearing pursuant to that scheme a violation of the owner's constitutional rights.

And this is really only common sense. The issue to be determined at the initial hearing pursuant to FS §162.07/OCC §11-35 is whether a violation of the codes exists on the owner's property. The issue that is determinative of the prospective deprivation posed by this statutory/ordinance scheme – the deprivation of money and interference with use of real property incident to the imposition of code enforcement fines – is whether the owner failed to correct those violations within the time provided by the CEB in its order issued at the initial hearing. Obviously, the initial hearing cannot be a hearing as to whether the owner complied with an order issued at that hearing to correct certain conditions on the property by some date in the future. Thus, while FS §162.07/OCC §11-35 do provide for an evidentiary hearing, it is not a hearing as to the issue that

is determinative of the deprivation at issue. Therefore, the presence of this hearing in the statutory/ordinance scheme is all but irrelevant to the issue at bar. At present, there is no hearing provided under the code enforcement scheme relative to the issue that is determinative of the deprivation of rights of the property owner posed by that scheme.

II. ONCE IT IS ESTABLISHED THAT A SECOND HEARING AS TO THE PROPERTY OWNER'S LIABILITY FOR FINES AND LIENS FOR ALLEGED CODE ENFORCEMENT VIOLATIONS IS REQUIRED, THE *MATHEWS* BALANCING TEST MAY NOT BE USED TO "BALANCE AWAY" THE PROPERTY OWNER'S RIGHT TO A HEARING ON THIS ISSUE ALTOGETHER.

Once it is realized that we are dealing here with the *complete absence* of a hearing required by due process, it becomes apparent why the lower court rulings in this case are a departure from previous Supreme Court jurisprudence on procedural due process rather than an extension of it as contended by the respondents. This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which the respondents claim to be subserved by the lower court rulings in this case, never altered the "root requirement" of due process that some form of hearing be afforded before an interest protected by the Fifth and Fourteenth Amendments[3] is divested. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). In fact, *Mathews* reaffirmed it:

> This Court consistently has held that some form of hearing is required before an

[3] All references to constitutional amendments in this reply are to the Amendments to the Constitution of the United States. Therefore, references to these amendments will be made by the number of the amendment only, *e.g.*, "the Fifth Amendment".

> individual is finally deprived of a property interest. *Mathews*, *supra*, 424 U.S. at 333.

What the *Mathews* decision *did* do was provide an analytical framework to be applied in cases where *some* form of hearing has been provided, and the question is whether the *nature and extent* of that hearing is sufficient to meet the requirements of due process in the factual circumstances of that case. In that context, the *Mathews* "balancing factors" are applied in order to make this determination.

Irrespective of any disparity in the relative weight of these factors, however, they can never be applied to "balance away" a party's right to a hearing otherwise required by due process altogether, and this is exactly what the lower court rulings did in this case: They applied the *Mathews* balancing factors to find that there was such a disparity between the weight of the interests of the COUNTY and the property owners that the property owners were not entitled to a hearing as to the propriety of imposing fines and liens for alleged code violations on them at all. This is completely inconsistent with any decision on procedural due process ever rendered by this Court.

Further, since the petition and briefs in opposition in this matter were filed, another Florida district court of appeal has joined the courts finding that imposition of fines and liens for alleged code enforcement violations on the property owner without notice and hearing pursuant to the procedure specified in FS §162.09(1) and OCC §11-37 does violate the procedural due process rights of the property owner. In *Wilson v. County of Orange*, 29 Fla. L. Weekly D1800 (Fla. 5th DCA 2004), the Florida Court of Appeal for the Fifth District reversed a circuit court's dismissal of a complaint under 42 USC §1983 wherein the allegations of the violation of constitutional rights were substantially identical to those in the instant case – that the CEB of the COUNTY had entered and caused to be recorded as a lien an order imposing fines on a property owner without notice and hearing pursuant to

the procedure provided in FS §162.09(1) and OCC §11-37. The court held that allegations, inter alia, that:

> ... [T]he County (1) procured the 'entry and recordation of CEB orders imposing fines and liens ... without a hearing'; (2) imposed fines and a lien based solely upon an affidavit; [and] (3) imposed excessive fines; ... (29 Fla. L. Weekly at D1801)

adequately stated a violation of the constitutional rights of the property owner sufficient to support a cause of action against the County under 42 USC §1983. *Id.*

III. THE DEPRIVATION IN QUESTION IS NOT A "TEMPORARY DEPRIVATION" AS THE LOSS OF MONEY POSED BY THE OBLIGATION TO PAY THE FINE IS PERMANENT, AND, EVEN IF IT WERE, "TEMPORARY" INTERESTS ARE EQUALLY AS ENTITLED TO DUE PROCESS PROTECTIONS AS PERMANENT INTERESTS.

The respondents echo the district court in asserting that the property interest of the petitioners deprived by the action of the COUNTY in the instant case is somehow entitled to less regard under due process analysis because it is "temporary" (CEB p. 11; OC p. 10). This argument both mistates the facts of the case and contravenes the law.

The characterization of the property interest of the petitioners deprived in the instant case as "temporary" ignores the fact that that deprivation consisted not only of the interference posed by the putative lien for code enforcement fines, but also of the money required to pay those fines (ultimately liquidated at $10,000.00). The petitioners' interest in the money required to pay this putative liability is also a property interest protected by the Fifth and Fourteenth Amendments. *City of Los Angeles v. David*, 538 U.S. 715,

718 (2003). The loss of the money required to pay this liability would be permanent. Thus, apparent on the facts of the case are both a temporary and a permanent deprivation effected by the COUNTY's actions.

This argument also ignores the existing law that, even if the interest in question were in fact only temporary, it would nevertheless be entitled to no less due process protection than permanent interests. *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972):

> The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.[4]

In fact, this Court has specifically held a property owner's interest in holding his property free of liens to be an interest entitled to due process protection, notwithstanding its temporary nature. *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991).

IV. THE COUNTY'S CODE INSPECTOR IS NOT A "DISINTERESTED PARTY", NOR IS HIS

[4] This quote is particularly apt in pointing out the error of the district court and respondents in the instant case in applying principles intended to be used in determining the *extent* of the hearing required by due process to determine *whether* a hearing is required at all. Here, they have used the "fact" that the interest in question is, assertedly, temporary to conclude that the property owner is entitled to no hearing relative to its deprivation. In a case such as this where *no* hearing has been provided relative to the deprivation of an interest, application of this and other factors pertinent to the *Mathews* analysis should not even be reached.

FUNCTION UNDER THE CODE ENFORCEMENT SCHEME OF DETERMINING WHETHER THE PROPERTY OWNER COMPLIED WITH AN ORDER OF THE CEB WITHIN THE TIME ALLOTTED A "MINISTERIAL ACT".

The COUNTY argues that the lower court rulings in this case do not depart from existing law because this case is distinguished by the fact that the COUNTY is disinterested in the determination in question (OC p. 12). Fines determined to be payable as a result of a determination that a property owner has not complied with an order of the CEB are payable to the COUNTY. The COUNTY thus has a very direct tangible financial interest in an adverse determination. This means that the COUNTY certainly cannot be said to be "disinterested" in the code inspector's determination, and, if anything, that, under the second factor of the *Mathews* analysis, there is a heightened risk of an erroneous determination present in this case in comparison with other cases cited. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56 (1993):

> That protection [of an adversary hearing] is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding. [Citations omitted.] (opinion of Scalia, J.) (slip op., at 19, n. 9) ('[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.')

An outlandish argument advanced by the respondents is a recitation of a concept developed by the district court in an effort to justify its ruling contrary to the law – that the determination by the COUNTY's code inspector as to whether the property owner had corrected the violations of the code(s) cited is a "ministerial act" (which therefore,

presumably, does not warrant review by a hearing since it could not have been decided any other way) (CEB pp. 2, 3, 9, 12, 14; OC pp. 11, 13). In law, a "ministerial act," is "an act in regard to which no discretion is committed to [the official required to perform it], and which, upon the facts existing, he is bound to perform ..." *Roberts v. United States*, 176 U.S. 221, 231 (1900). Thus, a ministerial act is one that involves no judgment at all in its performance, like filing a paper or computing interest. Aside from the fact that determining the function of a code inspector is "ministerial" is a factual determination that a district court is not permitted to make in ruling on a motion to dismiss (*See, e.g., Lopez v. First Union National Bank of Florida*, 129 F.3d 1186, 1189 (11th Cir. 1997), the function of the code inspector in evaluating myriad physical conditions as against many requirements of the pertinent codes obviously does not involve no judgment, and therefore is obviously not a ministerial act.

V. THE RIGHTS OF APPEAL AND OPPORTUNITIES TO PRESENT DOCUMENTARY EVIDENCE TO THE CEB ALLEGEDLY AVAILABLE TO THE RESPONDENT UNDER THE CODE ENFORCEMENT SCHEME MAY NOT BE DEEMED TO COMPENSATE FOR THE ABSENCE OF A HEARING AS TO THE PROPRIETY OF THE IMPOSITION OF FINES AND LIENS OTHERWISE REQUIRED BY DUE PROCESS.

Throughout their briefs, the respondents suggest that rights of appeal and supposed opportunities that the respondent has to bring motions and otherwise present documentary evidence to the CEB under the code enforcement scheme collectively "make up for" the lack of a hearing as to the imposition of fines and liens on the respondent required by due process (CEB pp. 2, 3, 10, 12, 16; OC pp. 13, 14, 16). Neither of these rights (assuming they in

fact exist) can be deemed to compensate for the lack of a required hearing under due process jurisprudence.

Rights of appeal have specifically been held by this Court not to compensate for absence of a hearing required by due process. *Goss v. Lopez*, 419 U.S. 565, 580, n. 10 (1975):

> Appellants point to the fact that some process is provided under Ohio law by way of judicial review. ... [This] is for two reasons insufficient to save inadequate procedures at the school level. First, ... the [appellate] proceeding is not *de novo*. [Citation omitted.] Thus, the decision by the school – even if made upon inadequate procedures – is entitled to weight in the court proceeding. Second, ... we must assume that delay will attend any [appellate] proceeding, that the suspension will not be stayed pending hearing, and that the student meanwhile will irreparably lose his educational benefits.

As to the rights to bring motions and otherwise to get documentary evidence before the CEB that the respondents assert the property owner has, it is important to note that none of these is specifically provided for under the statutory/ ordinance scheme in question. Under principles long traditional to due process analysis, no rights not affirmatively set forth in the procedural scheme under analysis may be considered in evaluating its constitutional sufficiency. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 425 (1915):

> ... 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' ... 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.' [Citations omitted.]

DATED: September 23, 2004

Respectfully submitted,

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